IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA, and COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION Plaintiffs, and LOWER SUSQUEHANNA RIVERKEEPER ASSOCIATION Plaintiff-Intervenor-Applicant, v. CAPITAL REGION WATER, and THE CITY OF HARRISBURG, PA Defendants.	Civil Action No. 1:15-cv-00291-CCC (Judge Christopher C. Conner)

MEMORANDUM IN SUPPORT OF LOWER SUSQUEHANNA RIVERKEEPER ASSOCIATION'S MOTION TO INTERVENE

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INTRODUCTION

Lower Susquehanna Riverkeeper Association ("LSRA") moves to intervene as of right in this lawsuit as a plaintiff, pursuant to 33 U.S.C. § 1365(b)(1)(B) and Fed. R. Civ. P. 24(a)(1), or alternatively, Fed. R. Civ. P. 24(a)(2). Plaintiffs the United States of America and the Commonwealth of Pennsylvania Department of Environmental Protection ("DEP") (collectively, "Plaintiffs") brought this underlying lawsuit against the City of Harrisburg, Pennsylvania and Capital Region Water ("CRW") (collectively, "Defendants") pursuant to the Clean Water Act ("CWA") and Pennsylvania's Clean Streams Law ("CSL") for permanent injunctive relief and civil penalties regarding the operation of the wastewater plant, combined sewage collection and conveyance system, and separate storm sewer system (collectively, "Harrisburg's sewer system").

In 2015, Plaintiffs and Defendants entered into a Partial Consent Decree ("Partial CD") that requires CRW to submit a number of deliverables, including a proposed long-term control plan ("LTCP") by April 1, 2018 to prevent or minimize combined sewage overflows ("CSOs"). As the Parties concede, the Partial CD does not resolve any claims for civil penalties against CRW or for injunctive relief relating to CRW's alleged failure to implement a LTCP that would curb CSOs.

Now, the Parties still have not delivered a final LTCP or consent decree that would stop the illicit discharges of pollutants from CSOs. Meanwhile, CRW

continues to discharge CSOs, including dry weather CSOs, from the combined sewer system as well as sanitary sewage overflows ("SSOs") that contain raw sewage from the separate sanitary sewer system, into the Susquehanna River and Paxton Creek. LSRA and its members are harmed by the Parties' continued delay in resolving these sewage overflows. Therefore, LSRA seeks to intervene to assert its specific interests in protecting the health of the Susquehanna River and Paxton Creek, and to ensure that these interests, which are distinctly and adversely affected by these polluted waterways, are adequately represented and protected.

PROCEDURAL & FACTUAL BACKGROUND

I. The 2015 Lawsuit, Partial Consent Decree

On February 10, 2015, Plaintiffs brought suit against Defendants in this Court for violations of the CWA and CSL, which include, among other things: discharging dry weather CSOs; discharging SSOs containing untreated sewage from point sources in the separate sanitary sewer system; failing to implement the nine minimum controls ("NMC") for CSOs as required by the U.S. Environmental Protection Agency's ("EPA's") CSO Policy; and failing to develop a LTCP as required by EPA's CSO Policy to minimize or prevent CSOs. Compl. ¶¶ 69–128, ECF No. 1 ("2015 Complaint").

The Parties filed a Partial CD that same day, ECF No. 4, and moved to enter it on May 22, 2015, ECF No. 8. The Court then entered the Partial CD on August

24, 2015. Order, ECF No. 11. The Partial CD requires CRW to submit a number of deliverables to be reviewed, and in some instances, approved by EPA, in consultation with DEP, and then implemented. Joint Status Report at 2 (Feb. 16, 2018), ECF No. 18. The Partial CD required CRW to submit to Plaintiffs for review and approval, within six months of lodging, a NMC Plan that identifies and includes an implementation schedule for actions necessary to achieve compliance with EPA's CSO Policy, and for the first five years after, an annual revision that includes a schedule for any additional actions necessary to comply with the NMCs. Partial CD ¶¶ 11, 12. As a major deliverable, CRW was required to submit a LTCP for the combined sewer system by April 1, 2018. *Id.* ¶ 14.

The Partial CD "does not resolve any claims for injunctive relief relating to CRW's alleged failure to implement an LTCP . . . and does not resolve any claims for civil penalties" against CRW. *Id.* ¶ 80. Instead, the "Parties contemplate[d] that there will be a second round of negotiations" to resolve the rest of the Complaint's claims. Joint Status Report at 3. In consideration of statements that "the [P]arties continue to satisfy deliverable requirements under the partial consent decree," the Court administratively closed the case on March 6, 2018. Order, ECF No. 23.

II. Post-Joint Status Report Developments and Outstanding Claims

CRW submitted its proposed LTCP plan to Plaintiffs on March 29, 2018. EPA rejected this submission, concluding that "it does not comply with the

requirements specified in the [Partial CD]" for myriad reasons. Compl. Ex. K, Letter from David Stewart, CRW to Plaintiffs, at 2 (Nov. 9, 2018). For example, "[u]nder the proposed LTCP, several CSOs appear likely to remain active 30 to 50 or even more times per typical year, which cannot possibly result in the achievement of [Water Quality Standards]." *Id.* at 4. EPA also took issue with CRW's cost estimates. *See generally id.*; *see also* Compl. Ex. L, Letter from David Stewart, CRW to Plaintiffs, at 1 (Nov. 27, 2019) ("[I]t appears that costs for many key project components have been grossly exaggerated.").

Presently, the Parties still have not reached a final LTCP or consent decree to resolve CRW's illicit sewage overflows into the Susquehanna River or Paxton Creek. In April 2020, Plaintiffs wrote, "[a]fter two years of very little progress, [CRW's] LTCP still does not meet the requirements specified in the [Partial CD], and despite the lengthy discussions and analyses undertaken by the parties, CRW still seems to be struggling with the concept of the LTCP plan." Compl. Ex. J, Letter from Stacie Pratt, EPA to Charlotte Katzenmoyer, CRW, at 1 (April 27, 2020). According to Plaintiffs, CRW not only continues to "inflat[e] the overall cost estimate of each project and CRW's ability to pay," but also "has failed to provide actual CSO projects that will reduce volume and frequency of overflows." *Id.* CRW continues to unlawfully dump large volumes of sewage into the Susquehanna River and Paxton Creek, "discharg[ing] more than 900 million

gallons of combined sewage" to waterways in 2019 alone. *Id.* at 2. Further, CRW's latest annual update to its NMC Plan failed to comply with EPA's CSO Policy. *See* Compl. Ex. I, Letter from Stacie Pratt, EPA, to David Stewart, CRW, at 1 (Mar. 5, 2020) (in which EPA "identif[ies] the instances where the NMCP does not comply with [EPA's 1995 Guidance for Nine Minimum Controls]"). The "most significant shortfall that EPA observed in the NMCP is the lack of Solids and Floatable Controls on the combined sewer outfalls [as] [f]loatables/solids capture is not optional but required under the USEPA 1994 Combined Sewer Overflow Policy." *Id.*

III. Lower Susquehanna Riverkeeper Association

The Parties' delay in reaching a final LTCP and consent decree continues to harm LSRA and its members. LRSA is a grassroots, membership-based nonprofit association. Compl. Ex. A, Decl. of Ted Evgeniadis ("Evgeniadis Decl.") ¶ 3. LSRA and its members, who include local residents, fisherman, business owners, and other users of the Lower Susquehanna Watershed, are dedicated to protecting and improving the ecological and aesthetic integrity of the Watershed and preserving the ability to fish, swim, and recreate safely in the Susquehanna River and Paxton Creek. *Id.* ¶ 6. Discharges of raw sewage directly impact LSRA's members by diminishing their economic, aesthetic, and recreational use of those

waterways. Evgeniadis Decl. ¶¶ 8, 10; Compl. Ex. C, Decl. of Rod Bates ("Bates Decl.") ¶¶ 7, 8; Compl. Ex. B, Decl. of Ilyse Kazar ("Kazar Decl.") ¶¶ 5, 8.

Consistent with its mission and the interests of its members, LSRA is concerned that the Parties are no closer to producing a LTCP to address CSOs. On February 27, 2020, ahead of LRSA's meeting with DEP, a letter was sent to DEP that raised concerns over the amount of time that had elapsed without addressing or imposing the actions necessary to significantly reduce, if not eliminate, the untreated sewage discharges. *See* Compl. Ex. E, Letter from Lisa Hallowell, Senior Attorney, EIP to Gov. Thomas Wolf and Maria Bebenek, Clean Water Program Manager, Southcentral Regional Office, DEP (Feb. 27, 2020). On September 18, 2020, a FOIA request and RTKL request were submitted to EPA and DEP, respectively, each of which requested records related to the status and progress of a final consent decree. *See* Compl Ex. F, FOIA Request from Lisa Hallowell, Senior Attorney, EIP to EPA (Sept. 18, 2020) & RTKL Request from Lisa Hallowell, Senior Attorney, EIP to DEP (Sept. 18, 2020). Responsive documents were provided by DEP and EPA on October 22, 2020 and December 10, 2020, respectively. *See* Compl. Ex. G, RTKL Final Response Letter from DEP to Lisa Hallowell, Senior Attorney, EIP (Oct. 22, 2020) & FOIA Final Response Letter from EPA to Lisa Hallowell, Senior Attorney, EIP (Dec. 10, 2020).

Upon reviewing these public records, LSRA realized the magnitude of the Parties' delay and CRW's foot-dragging, prompting LSRA to move to intervene in this lawsuit. Compl. in Intervention ¶¶ 80–92.

ARGUMENT

LSRA may intervene as of right in this action. *First*, LSRA has standing to join this lawsuit,[1] as its members have suffered, and will continue to suffer, adverse impacts from Defendants' unlawful discharges into the Susquehanna River and Paxton Creek. *Second,* LSRA is authorized to intervene pursuant to 33 U.S.C. § 1365(b)(1)(B) and Fed. R. Civ. P. 24(a)(1), which provides LSRA an unconditional right to intervene. Alternatively, LSRA may also intervene as of right under Fed. R. Civ. P. 24(a)(2), as it has an interest in the illicit sewage discharges that are the subject of this suit and is not adequately represented by the existing parties. *Third*, LSRA's motion has attached a complaint in intervention, as required by Fed. R. Civ. P. 24(c). Accordingly, this Court should grant LSRA's motion.

[1] It is LSRA's position that Article III standing is *not* a prerequisite for intervention as of right. In fact, the District Court for the Middle District of Pennsylvania has stated, through dicta, that such proposed intervenors need not demonstrate Article III standing. *Am. Farm Bureau Fed'n v. EPA*, 278 F.R.D. 98, 111 n.6 (M.D. Pa. 2011) (dicta) ("Movants assert that they need not show that they have Article III standing as a prerequisite for intervention as of right. The court agrees."). Neither the U.S. Supreme Court nor the Third Circuit have outrightly ruled on this question. In fact, the Third Circuit noted the circuit split on this issue but declined to address it. *Am. Auto. Ins. Co. v. Murray,* 658 F.3d 311, 318 n.4 (3d Cir. 2011). However, recognizing that the Third Circuit has not directly ruled on this issue, and the other circuit courts are split, LSRA demonstrates that it satisfies these standing requirements out of an abundance of caution.

I. Lower Susquehanna Riverkeeper Association Has Standing to Intervene.

LSRA has standing to bring this challenge. To establish standing to sue on behalf of its members, an association must show three things: *first*, the interests it seeks to protect are germane to its purpose; *second*, neither the claim asserted nor the relief requested requires the participation of individual members; and *third*, its members would have standing to sue in their own right. *Pa. Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 283 (3d Cir. 2002) (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

LSRA clearly satisfies this test. *First*, LSRA brings this challenge to protect the Lower Susquehanna Watershed from sewage pollution and to protect people's enjoyment of these waterways; the protection of the ecological and aesthetic qualities of the Watershed is an interest germane to LSRA's purpose. *See, e.g.*, Evgeniadis Decl. ¶ 6 ("LSRA and its members . . . are dedicated to preserving safe drinking water, the sustainable use of natural resources, and the ability to fish, swim, and recreate safely in the Susquehanna River and her tributaries."). *Second*, this lawsuit does not require the participation of LSRA's individual members because neither the claims asserted not the relief sought requires individualized proof. *See UFCW Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 546 (1996) (explaining that "'individual participation' is not normally necessary when an association seeks prospective or injunctive relief for its members" (citing *Hunt*,

432 U.S. at 343)). *Third*, as discussed below, LSRA's members would have standing to sue in their own right.

To demonstrate that its members would have standing to sue in their own right, LSRA must satisfy another three-part test: *first*, its members have suffered an actual or threatened injury; *second*, that injury is traceable to the unlawful sewage pollution; and *third*, the injury is likely to be redressed by a favorable judicial decision. *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 86 (3d Cir. 1991) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). LSRA easily satisfies this second test.

First, LSRA's members unquestionably have suffered actual or threatened injuries, because they use or wish to use the Susquehanna River and Paxton Creek, which receive excessive sewage pollution from Harrisburg's sewer system, and they are "persons 'for whom the aesthetic and recreational values of [those waterbodies] will be lessened' by the challenged activity." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 183 (2000) (quoting *Sierra Club v. Morton,* 405 U.S. 727, 735 (1972)); *see, e.g.*, Bates Decl. ¶¶ 8, 9 ("Personally, I very rarely eat the fish I catch from the areas downstream of Harrisburg because of the amount of sewage pollution that is illegally dumped into the river.").

Second, the injuries suffered by LSRA's members are traceable to the pollution from Harrisburg's sewer system. The traceability requirement "does not

mean that plaintiffs must show to a scientific certainty that defendant's effluent, and defendant's effluent alone, caused the precise harm suffered by the plaintiffs." *PIRG v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (finding that an aesthetic injury suffered by plaintiffs may fairly be traced to a defendant's effluent violations). Instead, a plaintiff may satisfy this requirement by showing that a defendant discharged (1) "some pollutant [not] allowed by its permit," (2) "into a waterway in which the plaintiff has an interest that is or may be adversely affected by [said] pollutant," and (3) that "this pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs." *Id.* LSRA has made such a showing here. Defendants have discharged, and continue to discharge, illicit untreated sewage. *See, e.g.*, Kazar Decl. ¶ 8 ("From my involvement with LSRA, I . . . understand that [CRW] is letting untreated sewage into the waterways."). This pollution is discharged into the Susquehanna River and Paxton Creek. *See, e.g.*, Evgeniadis Decl. ¶ 13 ("I have personally observed raw sewage and toilet paper floating near the mouths of the City's combined sewer outfalls."); Kazar Decl. ¶ 5 ("During my walks this past summer, I often saw brown, fuzzy, raw sewage collecting on the banks of the Susquehanna River."). And sewage overflows containing untreated sewage affect the health of these waterways and impair the ability of LSRA and its members to use and enjoy these waterways. *See, e.g.,* Bates Decl. ¶¶ 6, 7 ("I have noticed a serious decline in the density of smallmouth bass

downstream of these outfalls over the past four years. When I do catch smallmouth bass, I notice that more and more of them are sick with 'Blotchy Bass' syndrome . . . lesions, or tail rot. I worry about how the decline in the health and population of smallmouth bass will affect my fishing guide business. I also worry that the sewage pollution will scare away customers from booking fishing trips with my business.").

Third, the injuries suffered by LSRA's members will be redressed by a favorable judicial decision. LSRA seeks injunctive relief and civil penalties to redress the injuries to itself and its members. "Where a plaintiff complains of harm to water quality because a defendant exceeded its permit limits, an injunction will redress that injury . . . ." *PIRG*, 913 F.2d at 73; *see*, Kazar Decl. ¶ 8 ("My enjoyment of the River would vastly increase if the problem was addressed, because I would see less raw sewage in the River and I would know that the health of the River was improving. If the problem was fixed, I would . . . dip my feet in or wade in the river myself and consider eating the fish."). Meanwhile, "the deterrent effect of an award of civil penalties" would also redress LSRA's injuries. *PIRG*, 913 F.2d at 73. Thus, LSRA has standing to intervene in this matter.

II. Lower Susquehanna Riverkeeper Association May Intervene as a Matter of Right Pursuant to Federal Rule of Civil Procedure 24(a)(1).

Intervention under Fed. R. Civ. P. 24(a)(1) is allowed as of right where the proposed intervenor: (1) "is given an unconditional right to intervene by a federal

statute" and (2) files a "timely motion." Fed. R. Civ. P. 24(a). LSRA's motion satisfies both requirements.

A. Lower Susquehanna Riverkeeper Association has an unconditional statutory right to intervene under 33 U.S.C. § 1365(b).

LSRA may intervene pursuant to Fed. R. Civ. P. 24(a)(1) because the CWA, 33 U.S.C. § 1365(b)(1)(B), confers upon it an unconditional right to intervene in this matter. Intervention under Fed. R. Civ. P. 24(a)(1) is "absolute and unconditional." *Ruiz v. Estelle*, 161 F.3d 814, 828 (5th Cir. 1998) (quoting *Bhd. of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 531 (1947)).

The CWA establishes an unconditional right to intervention by providing that "any citizen may intervene as a matter of right" in a court action commenced and diligently prosecuted by EPA or a State. 33 U.S.C. § 1365(b)(1)(B). As a number of courts have held, this provision confers an unconditional statutory right to intervene. *See, e.g.*, *Dep't of Nat. Res. & Envtl. Control v. Mountaire Farms of Del., Inc.*, 375 F. Supp. 3d 522, 529 (D. Del. 2019) ("In the Court's view, the plain meaning of [the CWA] is clear . . . citizens are given an unconditional right to intervene."); *State of Ohio ex rel. Brown v. Callaway*, 497 F.2d 1235, 1242 (6th Cir. 1974) ("33 U.S.C. § 1365(b)(1)(B) confers upon all applicants an unconditional right to intervene . . . ."); *United States v. Mississippi*, 958 F.2d 112, 115 (5th Cir. 1992) ("This statutory language clearly evinces the legislature's intent to provide for a mandatory right of intervention."); *United States v. Metro.*

St. Louis Sewer Dist., 883 F.2d 54, 56 (8th Cir. 1989) ("The plain language of section 1365 states that, if the Administrator has commenced a civil action such as the one here, '*any citizen* may intervene *as a matter of right*.'").

When government commences a federal CWA enforcement action, the Act expressly authorizes intervention as a matter of right for "any citizen." 33 U.S.C. § 1365(b)(1)(B). "Citizen" is defined as any "person or persons having an interest which is or may be adversely affected." *Id.* § 1365(g). The CWA defines "person" to include, among other things, "an individual, corporation, partnership, [or] association." *Id.* § 1362(5). Citizen suit provisions, such as 33 U.S.C. § 1365(g), "ma[k]e clear that citizen groups are not to be treated as nuisances or troublemakers but rather as welcomed participants in the vindication of environmental interests," and such provisions "reflect[] a deliberate choice by Congress to widen citizen access to the courts." *Friends of the Earth v. Carey*, 535 F.2d 165, 172 (2d Cir. 1976) (quoting *Nat. Res. Def. Council, Inc. v. Train,* 510 F.2d 692, 700 (1975)). Here, it is beyond dispute that LSRA is a "citizen" within the meaning of § 1365(b)(1)(B). LSRA is a nonprofit association, which constitutes a "person" under the CWA.

LSRA has an interest that may be adversely affected by this litigation. As discussed above, *see supra* Section I, LSRA's members have been directly impacted by the unlawful discharges from the sewage system.

B. Lower Susquehanna Riverkeeper Association's motion is timely.

Courts consider "all of the circumstances" when determining whether a motion to intervene is timely, analyzing three factors: "(1) [h]ow far the proceedings have gone when the movant seeks to intervene, (2) the prejudice which resultant delay might cause other parties, and (3) the reason for the delay." *Am. Farm Bureau Fed'n v. EPA*, 278 F.R.D. 98, 104 (M.D. Pa. 2011) (alteration in original) (quoting *Choike v. Slippery Rock Univ. of Pa.,* 297 Fed. Appx. 138, 140 (3d Cir. 2008)); *see also Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir. 1995). When a proposed intervenor seeks intervention "as of right," as is the case here, the U.S. Court of Appeals for the Third Circuit has advised that "in situations in which intervention is of right the would-be intervenor may be seriously harmed if he is not permitted to intervene, courts should be reluctant to dismiss a request for intervention as untimely, even though they might deny the request if the intervention were merely permissive." *Mountain Top*, 72 F.3d at 369 (citation omitted). Here, LSRA's motion satisfies each of the three timeliness factors.

First, in considering how far the proceedings have gone when a movant seeks intervention, "the critical inquiry is: what proceedings of substance on the merits have occurred?" *Am. Farm Bureau Fed'n*, 278 F.R.D. at 104 (quoting *Mountain Top*, 72 F.3d at 369). "The mere passage of time, however, does not

render an application untimely." *Mountain Top*, 72 F.3d at 369 (citing *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 844 F.2d 1050, 1056 (3d Cir. 1988)). Here, the underlying case has not meaningfully progressed with respect to abating the sewage overflows and violations alleged in the 2015 Complaint.

As Plaintiffs described last year, "[a]fter two years of very little progress, [CRW's] LTCP still does not meet the requirements specified in the [Partial CD]." *See* Compl. Ex. J, Letter from Stacie Pratt, EPA to Charlotte Katzenmoyer, CRW, at 1 (April 27, 2020). In fact, "CRW still seems to be struggling with the concept of the LTCP." *Id.* The LTCP is a critical document, as it is meant to lay out CRW's plans to minimize CSOs and bring its discharges into full compliance with the CWA's water quality-based and technology-based requirements. *See* Partial CD ¶¶ 14–26. The fact that the Parties have entered the Partial CD should not sway the Court to deny intervention as it did not resolve claims against CRW for its illicit sewage overflows; instead, the lawsuit's claims for injunctive relief and civil penalties are still outstanding. *See id.* ¶ 80 (The Partial CD "does not resolve any claims for injunctive relief relating to CRW's alleged failure to implement an LTCP . . . and does not resolve any claims for civil penalties" against CRW.). Meanwhile, these illicit overflows continue to excessively pollute the Susquehanna River and Paxton Creek, and harm LSRA and its members' abilities to use and

enjoy these waterways. Thus, LSRA's motion satisfies the first factor of timeliness.

Second, courts consider the prejudice that any apparent delay may cause the existing parties. *Mountain Top*, 72 F.3d at 369. For this factor, a court measures prejudice caused by the intervenor's delay (if any), and *not by the intervention itself*. *See id.* at 370 (rejecting arguments that a movant's intervention would prejudice the existing parties' settlement negotiations since "that prejudice would not be attributable to any time delay"). LSRA satisfies this timeliness factor for two reasons: (1) LSRA's intervention would not prejudice the existing parties in the first place; and (2) LSRA did not delay in seeking intervention, and therefore any supposed prejudice would not be attributable to any time delay by LSRA. As to the first reason, LSRA's intervention will not prejudice the Parties because they have not made meaningful progress to resolve CRW's illicit sewage overflows. More than three years after CRW submitted its first proposed LTCP, CRW is still struggling with the LTCP's concept and has failed to provide a LTCP that meets the requirements of the Partial CD. As to the second reason, LSRA did not delay in seeking intervention, which is discussed next along with the last timeliness factor.

Lastly, courts look to whether a movant has delayed in moving for intervention, "measur[ing] from the time the proposed intervenor knows or should have known of the alleged risks to his or her rights or the purported

representative's shortcomings" until the time intervention is sought. *Benjamin ex rel. Yock v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 950 (3d Cir. 2012) (citations omitted). If a court finds that a movant has delayed in seeking intervention, the court then evaluates whether there were "adequate reasons for their delay." *Mountain Top*, 72 F.3d at 370.

Here, LSRA did not delay in applying for intervention as its interest stems from the existing parties' own delay in abating ongoing violations and in reaching a final LTCP and consent decree to resolve CRW's illicit sewage overflows. Now more than three years after CRW submitted the LTCP, the Parties appear nowhere close to executing a final LTCP or consent decree to curb sewage overflows and abate CRW's violations. LSRA did not realize the magnitude of this delay and CRW's foot-dragging until after December 2020, when LSRA received public records that revealed the Parties' shortcomings in reaching resolution of CRW's continued violations. *See* Compl. in Intervention ¶¶ 80–92. Meanwhile, CRW "discharged more than 900 million gallons of combined sewage" to the Susquehanna River and Paxton Creek in 2019 and will continue to do so each day this delay persists. Compl Ex. J, Letter from Stacie Pratt, EPA to Charlotte Katzenmoyer, CRW, at 2 (April 27, 2020). Because LSRA did not delay in moving to intervene, LSRA's motion satisfies the second and third factors of timeliness.

For the reasons discussed above, LSRA's motion is timely. And because 33 U.S.C. §1365(b)(1)(B) imparts LSRA with an unconditional right to intervene, LSRA has the right to intervene in this matter.

III. Lower Susquehanna Riverkeeper Association May Intervene as a Matter of Right Under Federal Rule of Civil Procedure 24(a)(2).

In the alternative, intervention is appropriate as of right under Fed. R. Civ. P. 24(a)(2). To establish the right to intervene under Rule 24(a)(2), this Court requires an intervenor to: (1) submit a timely motion; (2) demonstrate a sufficient interest in the litigation; (3) prove that the interest would be impaired or affected if the intervention was not allowed; and (4) establish that the interest is inadequately represented by existing parties. *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998) (citations omitted); *United States v. Alcan Alum., Inc.*, 25 F.3d 1174, 1181 (3d Cir.1994). LSRA's motion is timely for the same reasons set out previously. *See supra* Section II.B. And as further discussed below, LSRA's motion also satisfies the other three factors required under Fed. R. Civ. P. 24(a)(2).

First, LSRA has an interest the subject matter at issue here—the illicit sewage overflows into the Susquehanna River and Paxton Creek—for the same reasons LSRA has standing to sue. A proposed intervenor's interest must be impaired, specific, and "significantly protectable." *Diamond v. Charles*, 476 U.S. 54, 68 (1986) (quoting *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). Here, LSRA has a "significantly protectable" interest in this litigation because not

only do their members utilize these waterways for economic, recreational, and aesthetic purposes, but also LSRA's mission is devoted to protecting and promoting the health of these waterways. *See Am. Farm Bureau Fed'n*, 278 F.R.D. at 107 (finding that an environmental group had "demonstrated a legally protectable interest" in a case after the group asserted its "members utilize the [waterway] and its tributaries for recreational and aesthetic purposes" and the matter affected "the core mission of the group[]").

Second, proposed intervenors must "demonstrate that their interest might become affected or impaired, as a practical matter, by the disposition of the action in their absence." *Id.* (citing *Mountain Top*, 72 F.3d at 368); Fed. R. Civ. P. 24(a)(2). Here, LSRA's interest would be impaired or affected by an adverse disposition of this action without their involvement. For instance, a final LTCP or consent decree that included weaker requirements would jeopardize LSRA's interests in protecting the health of the Susquehanna River and Paxton Creek or maintaining their members' use and enjoyment of these waterways. In addition, a final LTCP or consent decree executed after years of postponement would also jeopardize these interests, as CRW would continue to discharge enormous volumes of sewage into the River and Creek until CRW carried out the work laid out in these documents.

Third, LSRA's interests are inadequately represented by Plaintiffs because those agencies represent "the broad public interest," and not the specialized interest of LSRA's members. Fed. R. Civ. P. 24(a)(2); *see Am. Farm Bureau Fed'n*, 278 F.R.D. at 110 ("The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy the minimal burden." (citations omitted)); *see also Trbovich v. UMW*, 404 U.S. 528, 538 n.10 (1972) (concluding that the "burden of making [such a] showing should be treated as minimal"). This Court has recognized that governmental entities, such as EPA, may not adequately represent the interests of an environmental group. *See Am. Farm Bureau Fed'n*, 278 F.R.D. at 111. In *Am. Farm Bureau Fed'n*, this Court granted intervention to an environmental group after finding that EPA did not adequately represent its interests, explaining that "[b]ecause the EPA represents the broad public interest, it must consider not only the interests of the public interests groups, but also the possibly conflicting interests from agriculture, municipal stormwater associations, and land developers." *Id.*; *see Benjamin ex rel. Yock*, F.3d at 951 ("[A]n agency's views are necessarily colored by its view of public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light." (citations omitted)); *Kleissler*, 157 F.3d at 971 ("Rather than barring access to [public interest groups], Rule 24 allows the court to give them the opportunity to present their positions" and "call governmental

agencies to task in litigation."). Thus, Plaintiffs do not adequately represent the interests of LSRA.

For the foregoing reasons, LSRA may intervene as of right under Fed. R. Civ. P. 24(a)(2).

IV. Lower Susquehanna Riverkeeper Association Has Provided a Complaint in Intervention.

As required by Fed. R. Civ. P. 24(c), LSRA's motion to intervene is "accompanied by a pleading that sets out the claim or defense for which intervention is sought."

CONCLUSION

LSRA respectfully request that the Court grant its motion for intervention as of right. To summarize, LSRA has standing to join this lawsuit, attached a complaint in intervention to its motion, and satisfies the requirements to intervene as of right under Fed. R. Civ. P. 24(a)(1), or alternatively, under Fed. R. Civ. P. 24(a)(2).

Dated: May 6, 2021

Respectfully submitted,

/s/ Lisa Widawsky Hallowell
Lisa Widawsky Hallowell
Environmental Integrity Project
1000 Vermont Avenue NW, Suite 1100
Washington, DC 20005
Phone: (202) 294-3282
Fax: (202) 296-8822
Lhallowell@environmentalintegrity.org

Counsel for Plaintiff-Intervenor LSRA

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word-count limit of Local Rule 7.8(b) because, excluding the exempted parts of the document (*i.e.*, caption, tables, signature block, and footnotes), it contains no more than 5,000 words.

/s/ Lisa Widawsky Hallowell
Lisa Widawsky Hallowell